United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by:
Joseph A. Pavone
Estimated Time: 15 Minutes

Docket No. 76-1437

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P&S

In The

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

— *vs.* —

ANTHONY L. CAVALLARO,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

— *vs.* —

GERALD J. BROWN,

Appellant.

On Appeal From The United States District Court
For The Northern District Of New York

BRIEF FOR APPELLEE,
United States of America

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United States Court of Appeals

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UNITED STATES OF AMERICA,
Appellee,
v.
ANTHONY L. CAVALLARO,
Appellant.

UNITED STATES OF AMERICA,
Appellee,
v.
GERALD J. BROWN,
Appellant.

BRIEF FOR APPELLEE,
United States of America

STATEMENT OF ISSUES

1. Whether there was sufficient evidence at trial to establish a violation of the Federal Kidnaping Act beyond a reasonable doubt.

2. Whether the word "otherwise" in the Federal Kidnaping Act is unconstitutionally vague.

3. Whether the trial court erred in refusing to permit questioning of the victim's address at the time of trial.

4. Whether the trial court erred in admitting in evidence testimony of the assault on the witness Sampson immediately after the kidnaping.

5. Whether the trial judge's conduct during the trial deprived the defendants of a fair trial.

STATEMENT OF THE CASE

On February 4, 1976 a one count indictment was filed with the United States District Court for the Northern District of New York charging the defendants Anthony L. Cavallaro and Gerald J. Brown with kidraping and aiding and abetting in the kidnaping of Mary Shepherdson in violation of Title 18, United States Sections 1201(a) and 2. (A 1 and 3).[1/]

On July 9, 1976 trial commenced before the Honorable Lloyd F. MacMahon, sitting by designation, and a jury. (A 1). On July 13, 1976 the jury returned a verdict of guilty as to both defendants. (A 1 and 220).

On September 16, 1976 Judgment was entered against both defendants and both were committed to the custody of the Attorney General for imprisonment for a period of twenty-five (25) years. (A 4).

STATEMENT OF FACTS

The statement of the case included in the brief filed on behalf of the defendant Cavallaro (Cavallaro Brief pp. 2-12) is acceptable to the United States to the extent that it summarizes

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1/ Reference is to Appendix filed on behalf of Appellant Anthony L. Cavallaro.

the testimony of most of the witnesses at trial with the following additions:

1. Deborah Buchanan observed the co-defendant, Gerald Brown, push Mary Shepherdson into the car. (A 128).

2. The defendant Cavallaro participated in the assault on the witness Richard Sampson. (A 147).

To the extent that it summarizes the testimony of various witnesses, the statement of facts included in the brief filed on behalf of the defendant Brown (pp. 2-9) is acceptable to the United States with the following exception and addition:

1. Contrary to the positive assertion in Brown's Brief (p. 3), the testimony is ambiguous at best as to whether the defendant Cavallaro first displayed a gun in New York or Pennsylvania (Tr. 49-51).

2. Mary Shepherdson did not attempt to escape or call the police after release because she was "too scared" and because the defendants told her not to (Tr. 58).

Based upon the summarization of the testimony included in the briefs filed on behalf of both defendants, and based upon the above-mentioned exception and additions, the United States submits that the jury could have found, and did find, the following facts.

On or about December 10, 1975 the defendant Anthony Cavallaro apparently became the victim of a swindle or "rip-off" involving the transfer of drugs. Cavallaro let it be known to persons in and around the Binghamton, New York area, including Mary Shepherdson, Deborah Buchanan, Richard Fitch, Richard Sampson and David Baer, that he, Cavallaro, intended to seek information about the rip-off and to obtain revenge. To carry out his purposes, Cavallaro procured the assistance of the defendant Gerald J. Brown.

In the evening of December 10, 1975, Cavallaro and Brown went to the home of Deborah Buchanan at 5 Camden Street, Johnson City, New York for the purpose of abducting Mary Shepherdson, who was visiting Buchanan, and extracting information from her about the "rip-off".

The defendant Brown who was armed with a gun, went into the house on Camden Street and took Shepherdson out without her consent. Brown then pushed her into the front seat of an automobile, got into the back seat with David Baer, a former boyfriend of Shepherdson, who was also in the car, and both Cavallaro, who was driving, and Brown forced Shepherdson to ride with them in the car.

During the abduction Brown and Cavallaro interrogated Shepherdson about her knowledge of the "rip-off" all the while

threatening her with violence. The defendant Brown held her hands behind her back during part of the trip.

On at least two separate occasions, Shepherdson's life was threatened. At one point in the ride, Cavallaro slammed on the brakes of the car, pulled out a gun and pointed it at Shepherdson. Cavallaro expressed anger at his inability to uncover those responsible for the "rip-off" and he demanded information from Shepherdson.

Thereafter, the car stopped a second time and everyone got out. On this occasion, Cavallaro and Brown drew their guns, aimed them at Shepherdson, and fired three shots in close proximity to her.

During the abduction Shepherdson was transported from the State of New York to the State of Pennsylvania. She was subsequently returned to the Camden Street address in Johnson City, New York at approximately 2.00 A.M. on the morning of December 11, 1975.

ARGUMENT

POINT I

THERE WAS SUFFICIENT EVIDENCE AT TRIAL TO ESTABLISH A VIOLATION OF THE FEDERAL KIDNAPING ACT BEYOND A REASONABLE DOUBT

The Federal Kidnaping Act, Title 18, United States Code, Section 1201, provides in pertinent part as follows:

> §1201. Kidnaping
>
> (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts or carries away and holds for ransom or reward or otherwise any person, . . ., when:
>
> (1) the person is willfully transported in interstate or foreign commerce;
>
> . . .
>
> shall be punished by imprisonment for any term of years or for life.

In order to establish the offense of kidnaping, the following essential elements must be proved beyond a reasonable doubt:

1. That the defendants willfully and unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted or carried away a person against his will for ransom, reward or otherwise;

2. That the person was transported across state lines.

Title 18, United States Code, §1201(a); Chatwin v. United States, 326 U.S. 455, 459-460 (1946); United States v. Johnson, 514 F.2d 92, 94-95 (C.A. 5, 1975), cert. denied 423 U.S. 1020.

Involuntariness of seizure and detention is the very essence of the crime of kidnaping. Chatwin v. United States, supra at 464. Defendants do not dispute this basic principle and indeed rely heavily on the Chatwin case in support of their contention that the evidence at trial failed to establish a prima facie case of kidnaping. In Chatwin the Supreme Court made the following statement in connection with the elements of the crime and the proof required to convict:

(326 U.S. at 460)

> The act of holding a kidnaped person for a proscribed purpose necessarily implies an unlawful physical or mental restraint for an appreciable period against the person's will and with a willful intent so to confine the victim. If the victim is of such an age or mental state as to be incapable of having a recognizable will, the confinement then must be against the will of the parents or legal guardian of the victim. In this instance, however, the stipulated facts fail to reveal the presence of any of these essential elements.
>
> (1) There is no proof that Chatwin or any of the other petitioners imposed at any time an unlawful physical or mental restraint upon the movements of the girl. Nothing indicates that she was deprived of her liberty, compelled to remain

> where she did not wish to remain, or compelled to go where she did not wish to go. For aught that appears from the stipulation, she was perfectly free to leave the petitioners when and if she so desired. In other words, the Government has failed to prove an act of unlawful restraint.
>
> (2) There is no proof that Chatwin or any of the other petitioners willfully intended through force, fear or deception to confine the girl against her desires. While bona fide religious beliefs cannot absolve one from liability under the Federal Kidnaping Act, petitioners' beliefs are not shown to necessitate unlawful restraints of celestial wives against their wills. Nor does the fact that Chatwin intended to cohabit with the girl and to live with her as husband and wife serve as a substitute for an intent to restrain her movements contrary to her wishes, as required by the Act. [Emphasis added]

The absence of deprivation of liberty of the alleged victim in Chatwin and the absence of force, fear or deception to confine on the part of the defendants are not the circumstances of the case under consideration. This Court need look no farther than the statement of the facts submitted on behalf of both Brown and Cavallaro. (Brown Brief, pp. 2-9; Cavallaro Brief, pp. 2-12).

Notwithstanding this evidence of seizure, constraint and force which is apparent from these statements, defendants maintain that such evidence is lacking until the car had crossed the state line into Pennsylvania.

The United States submits, however, that there is substantial evidence in the record to show seizure and restraint in New York.

However, assuming arguendo that the evidence fails to disclose a confinement of Shepherdson by the defendants until the car had reached Pennsylvania, then it necessarily follows, and the jury could have readily found, that the defendants had intended to inveigle and decoy her into accompanying them in the car and to thereafter deprive her of her liberty by force and violence after reaching Pennsylvania.

In United States v. Hoog, 504 F.2d 45, 51 (C.A. 8, 1974), cert. denied 420 U.S. 961, the Court defined "inveigle" as "to lure or entice or lead astray by false representations or promises, or other deceitful means." It also defined "decoy" as "enticement or luring by means of some fraud, trick, or temptation * * *." Id. The trial court in the case under consideration properly instructed the jury in this regard. (A 205-207).

Finally, the element of interstate transportation is jurisdictional only, and proof of knowledge of a crossing from one state to another on the part of the offenders is not necessary. United States v. Napier, 518 F.2d 316, 318-319 (C.A. 9, 1975), cert. denied 423 U.S. 895.

POINT II

THE WORD "OTHERWISE" IN THE FEDERAL KIDNAPING ACT IS NOT UNCONSTITUTIONALLY VAGUE

The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. United States v. Harriss, 347 U.S. 612, 617, (1953). In this case, Title 18, United States Code, §1201(a) proscribes the "kidnaping of a person for ransom, reward or otherwise". The United States submits that the statute proscribes kidnaping regardless of the purpose and a person of ordinary intelligence would be on notice of that fact.

The phrase "or otherwise" has been the subject of extensive consideration by the Courts. The Supreme Court has held that the kidnaping need not be for pecuniary benefit, Gooch v. United States, 297 U.S. 124, 128 (1936) and that it need not be for an illegal purpose. United States v. Healy, 376 U.S. 75, 82 (1964). Indeed, the circuit courts have consistently affirmed convictions for kidnaping regardless of the defendants' purpose. See United States v. Atchison, 524 F.2d 367, 369-370 (C.A. 7, 1975) and cases cited therein.

Notwithstanding the overwhelming weight of authority, defendants apparently contend that financial reward of the offender is a prerequisite to successful prosecution for kidnaping. This Court has previously rejected such a narrow reading of the kidnaping act. United States v. DeLaMotte, 434 F.2d 289, 292-293 (C.A. 2, 1970), cert. denied 401 U.S. 921.

POINT III

THE TRIAL COURT DID NOT ERR IN REFUSING TO PERMIT QUESTIONING OF THE VICTIM'S ADDRESS AT THE TIME OF TRIAL

There can be no doubt that the Sixth Amendment right of an accused to confront the witnesses against him includes the right to cross-examine those witnesses. Pointer v. Texas, 380 U.S. 400, 404 (1965). Ordinarily, this right includes the right to inquire as to the witness' current address. Smith v. Illinois, 390 U.S. 129, 131-133 (1968); Alford v. United States, 282 U.S. 687 (1931). The purpose of the inquiry is to identify the witness with his environment; ". . . to place the witness in his proper setting and put the weight of his testimony and credibility to a test . . ." Alford v. United States, supra at 692.

However, the right to ask a witness for his current address is not absolute, and it has been consistently held by this Court and others, that disclosure of the witness' current address will not be required when there is reason to believe that the witness' safety may be endangered. United States v. Persico, 425 F.2d 1375, 1383-1384 (C.A. 2, 1970), cert. denied 400 U.S. 869; United States v. Marti, 421 F.2d 1263, 1265-1266 (C.A. 2, 1970); United States v. Baker, 419 F.2d 83, 87 (C.A. 2, 1969), cert. denied 397 U.S. 971; United States v. Bennett, 409 F.2d 888, 901 (C.A. 2, 1969), cert. denied 396 U.S. 852, reh. denied 396 U.S. 949; Caldwell v. Minnesota, 536 F.2d 272, 273-274 (C.A. 8, 1976); United States v. Rangel, 534 F.2d 147, 148 (C.A. 9, 1976); McGrath v. Vinzant, 528 F.2d 681, 685 (C.A. 1, 1976), cert. dismissed 96 S.Ct. 1221; United States v. Crockett, 506 F.2d 759, 762 (C.A. 5, 1975), cert. denied 423 U.S. 824; United States v. Smaldone, 484 F.2d 311, 318-319 (C.A. 10, 1973), cert. denied 415 US. 915.

The prosecutor need only show an apparent danger to the physical health and well being of the witness; thereafter, it is incumbent upon the defense to show a need for the current address. United States v. Baker, supra at 87; United States v. Smaldone, supra at 319; United States v. Crockett, supra at 762; United States v. Marti, supra at 1266. Moreover, that need may not be asserted in vague generalities, but must be

sufficiently particularized to enable the court to weigh the need against the danger to the witness. United States v. Baker, supra at 87; United States v. Bennett, supra at 901.

McGrath v. Vinzant, supra, represents a case strikely similar to the case under consideration. In McGrath, the appellant was tried and convicted in Massachusetts state court for rape, kidnaping and assault with a dangerous weapon. His petition for habeas corpus was denied and the sole issue on appeal was whether his constitutional rights were violated when the trial judge refused to permit the victim to reveal her address at the time of trial. 528 F.2d at 682. In affirming the denial of the petition, the Court held as follows:

(Id. at 685)

> To be sure, if there had not been this sufficient justification for concealing the witness' address, petitioner would have had the unqualified right to that information, with no obligation to provide reasons for it. See United States v. Honneus, 508 F.2d 566, 572 (1st Cir. 1974), cert. denied, 421 U.S. 948, 95 S.Ct. 1677, 44 L.Ed.2d 101 (1975). But here, as we have indicated, the record demonstrates both a proper reason to withhold the address and an open and meaningful opportunity to cross-examine in other respects. Under these circumstances, petitioner could no longer rely merely on that general right. This is not to say that he would then be completely foreclosed from obtaining the witness' address, but it became incumbent on him to show a particular need for it which the judge could weigh against the risk to Miss Perry from disclosure. No such particular need was shown.

In reaching this conclusion, the Court relied upon the fact that there was a fair inference of danger to the witness merely by reason of the nature of the case that there was full disclosure of the witness' background apart from her current address, and that the defense had failed to show any special or likely relevance for the address. Id. at 684-685.

In the case under consideration, there was a fair inference of danger to the witness, Shepherdson,[2/] and the witness was subject to extensive and searching examination of her background and lifestyle. Moreover, there was no showing of relevance or special need for Shepherdson's address at the time of trial. Finally, there was no restriction on cross-examination beyond the current address. Under all these facts and circumstances, the Court did not err in prohibiting inquiry into the address.

POINT IV

THE TRIAL COURT DID NOT ERR IN ADMITTING IN EVIDENCE TESTIMONY OF THE ASSAULT ON THE WITNESS SAMPSON IMMEDIATELY AFTER THE KIDNAPING

While evidence of other crimes, wrongs or acts, is not admissible to prove character, there is no question that such

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2/ Indeed Shepherdson had been relocated under the Witness Protection Program (A 16).

acts are admissible for other purposes such as proof of motive opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Fed. R. Evid. 404(b); United States v. Deaton, 381 F.2d 114, 117-118 (C.A. 2, 1967) and cases cited therein. See also, United States v. Frazier, 418 F.2d 854 (C.A. 4, 1969); United States v. Weems, 398 F.2d 274, 275 (C.A. 4, 1968), cert. denied 393 U.S. 1099; Loux v. United States, 389 F.2d 911, 918-919 (C.A. 9, 1968), cert. denied 393 U.S. 867; Reed v. United States, 364 F.2d 630, 633 (C.A. 9, 1966), cert. denied 386 U.S. 918.

As previously stated, essential to the offense of kidnaping is an intent upon the part of the perpetrators to hold the victim against his or her will. The determination of that central question necessarily revolves around the intent of the defendants on the night in question. In other words, what was the state of mind of Brown and Cavallaro on the evening of December 10, 1975 and early morning of December 11, 1975? The United States submits that the assault on Sampson evidenced that state of mind. Contrary to defendants' contention, the assault was not a remote occurrence, unrelated to the kidnaping of Shepherdson. Sampson was accosted by the defendants immediately after Shepherdson's return to Camden Street on December 11, 1975. (A 146-148). Both Cavallaro and Brown participated in the assault. This evidence was highly relevant to the state of mind

of both that evening. Moreover, the evidence tended to establish the identity of Brown, which became an issue at trial. The fact that the assault took place immediately after the kidnaping does not preclude admissibility. In United States v. Gallington, 488 F.2d 637 (C.A. 8, 1973), cert. denied 416 U.S. 907 the defendant appealed his conviction for kidnaping alleging, inter alia, error in the admission at trial of evidence of other crimes after the kidnaped victim had escaped. In affirming the conviction, the Court rejected the argument, stating as follows:

(488 F.2d at 641)

> [6] We find no merit to defendants' contention that the trial court erred in admitting testimony as to the offenses which took place after the kidnapping victim, Goergen, escaped from his captors. Specifically, they charge that it was error to admit testimony that a shot was fired at Officer Tolvstad's patrol car and that it was fired from the pistol found on Gallington's person at the time of his arrest. Similarly, they object to the admission of the testimony of Farrell that he was kidnapped by Streeter after the latter left the camper and sought to make his escape. The testimony, in our view, was admissible because the acts testified to were integral parts of the offense for which the defendants were charged. See, United States v. Cochran, 475 F.2d 1080, 1082-1083 (8th Cir. 1973). The testimony also served to show the identity of the defendants. See, Drews v. State of Minnesota, 407 F.2d 1307, 1308-1309 (8th Cir. 1969); Abernathy v. United States, 402 F.2d 582, 584 (8th Cir. 1968).

Moreover, the Court properly instructed the jury as to the evidence of the assault. (A 211-212).

POINT V

THE TRIAL JUDGE'S CONDUCT DURING THE TRIAL DID NOT DEPRIVE THE DEFENDANTS OF A FAIR TRIAL

There is no question but that a trial judge must avoid the impression of partisanship; however, the judge also has a duty to actively aid the jury in understanding testimony. United States v. Tyminski, 418 F.2d 1060, 1062 (C.A. 2, 1969), cert. denied 397 U.S. 1075. The role of the trial judge has been described as ". . . more than a moderator or an umpire [with] an active duty to see that any trial, including a criminal one, is fairly conducted and the issues clearly presented." United States v. Cuevas, 510 F.2d 848, 850 (C.A. 2, 1975). See also United States v. Sclafani, 487 F.2d 245, 256 (C.A. 2, 1973), cert. denied 414 U.S. 1023.

When testimony is unclear and in need of clarification it is appropriate for the court to make inquiry. Fed. R. Evid. 614(b); United States v. Bernstein, 533 F.2d 775, 795-796 (C.A. 2, 1976). In addition, the court may always refuse to admit evidence on its own motion. "A trial judge does not become an advocate in litigation by stopping on his own motion, whether

on direct or cross-examination, an improper line of inquiry." United States v. Wright, 542 F.2d 975, 979 (C.A. 7, 1976).

When an issue has been raised concerning a trial courts conduct, this court has often searched the record to determine whether the defendants have received a fair trial. United States v. D'Anna, 450 F.2d 1201, 1206 (C.A. 2, 1971); United States v. Sclafani, supra at 256.

The defendants in this case argue that the trial courts examination of witnesses, the trial courts instructions to counsel, "sarcastic" remarks of the Court and sustained objections that were never made manifest a bias in favor of the prosecution and therefore, deprived the defendants of a fair trial (Brief of Appellant Brown, pp. 15-16). The United States submits, however, that none of the instances cited by the defendants, either individually or collectively, demonstrate bias in favor of the prosecution on the part of the trial judge. Moreover, defendants have failed to demonstrate bias and have failed to show any prejudice to their rights to a fair trial. A brief review of defendants' arguments is as follows:

a. Examination of Witnesses by the Court --- defendants cite numerous instances where the court directed questions to the witnesses. (Brief of Appellant Brown, p. 15). The United

States submits, however, that the purpose for the court's questions were for clarification of the testimony and demonstrated no bias. Significantly, defendants point out only one instance where, it is contended, the Court demonstrated bias in its questions. Defendants argue that the court at the conclusion of the cross-examination of the witness Baer destroyed "effective cross-examination." However, the record reflects that both defense counsel and the court were attempting to elicit from the witness the basis for his testimony that Shepherdson was cooperating with the defendants (pp. 279-281).

b. Instructions to counsel --- defendants cite eleven instances where, it is alleged, the court gave instructions to counsel to the defendants' prejudice. Six of these instances were directed to the government attorney, three of which directed him to be quicker with his objections (Tr. 112, 120, 175)[3/] and one of which directed him to keep his voice up (Tr. 285). In the remaining cited instances, the court in essence objected to a question posed by the government attorney (Tr. 154) and admonished the government attorney for improper redirect examination (Tr. 232).

Defendants allege five instances of instruction by the court to defense counsel in support of the claim of bias. In these cited instances, the Court requested clarification of

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3/ Reference is to trial transcript.

a point which was thought to have been previously resolved at sidebar (Tr. 127); the Court twice requested a clearer form of a question (Tr. 144, 295); the Court requested a foundation prior to admission in evidence of an exhibit (Tr. 171-172); and the Court interrupted an argumentative question (Tr. 230). These rulings by the trial judge are consistent with his role in the conduct of a trial. The United States submits that a 6-5 split of these rulings does not demonstrate bias in favor of the prosecution nor prejudice to the defendants' rights.

c. "Sarcastic remarks" --- Defendants contend that the Court made seven "sarcastic" remarks during the trial which deprived them of their right to a fair trial. The seven cited instances included an observation by the Court that the police probably have a telephone (Tr. 191); characterization of the word visitor (Tr. 220); a cautionary instruction to the jury that counsel's remarks are not evidence (Tr. 224-225); an objection to a question by the government attorney directed to a subpoenaed witness (Tr. 233); two admonitions from the Court regarding the elicitation of testimony involving multiple conversations (Tr. 236, 260); and the utterance of the expression "for heaven's sake" immediately after a colloquy regarding the admissibility of "hearsay" evidence (Tr. 250-251).

The Government submits that none of these comments by the court can be characterized as "sarcasm". Moreover, there

is no showing whatever that they display bias in favor of the prosecution or effect a denial of the defendants' right to a fair trial.

d. Sustained objections that were never made --- Defendants allege that the court sustained objections that were never made six times and, in so doing, manifest bias in favor of the prosecution which deprived them of a fair trial. Defendants, however, never demonstrate how the court's actions manifest this bias. Moreover, of the six instances cited, in two of them the court could have anticipated objections because objections had been made to similar prior questions (Tr. 113-114; 171-172); of the remaining four, three could arguably have favored the government (Tr. 115, 122 and 177) and one the defense (Tr. 39). The government submits these rulings did not manifest bias in favor of the prosecution, nor did they deprive defendants of the right to a fair trial.

By way of summary, the government contends that the record of the trial in its entirety, fails to disclose manifest bias in favor of the prosecution on the part of the trial judge and fails to disclose that the defendants were deprived of a fair trial. Our system of justice requires judges who are impartial. United States v. D'Anna, supra at 1206. The Government submits that impartiality of a trial judge is synonomous with fair and

equal treatment of the parties before him, and fair and equal application of the law to those parties. Moreover, impartiality on the part of a trial judge requires that he afford parties before him opportunity to make a full and complete statement of their case.

Except for the question of the victim's address, which has been previously discussed, defendant's do not allege inability to make their case in the trial court nor do they allege error in the Courts instructions on the law. The trial judge's conduct in this case was in keeping with his role. United States v. Cuevas, supra. Moreover, he properly instructed the jury as to what that role is (Tr. 359-361). (United States v. D'Anna, supra at 1206-1207).

CONCLUSION

The verdict and judgment of the district court should be affirmed.

Respectfully submitted,
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